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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

9 TIMOTHY KERLEY,

10 Plaintiff,

11 v.

12 NANCY A. BERRYHILL, Acting
13 Commissioner of the Social Security
Administration,

14 Defendant.

CASE NO. 2:16-CV-01841 JRC

ORDER ON PLAINTIFF'S
CONTESTED MOTION FOR
ATTORNEY'S FEES PURSUANT
TO THE EQUAL ACCESS TO
JUSTICE ACT

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16 This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and
17 Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S.
18 Magistrate Judge and Consent Form, Dkt. 3; Consent to Proceed Before a United States
19 Magistrate Judge, Dkt. 5). This matter comes before the Court on plaintiff's contested
20 motion for attorney's fees and costs pursuant to the Equal Access to Justice Act, 28
21 U.S.C. § 2412 (hereinafter "EAJA") (*see* Dkts. 18, 19).

22 In this matter, the Court reversed the ALJ's written decision based on new
23 evidence submitted to the Appeals Council that was not before the ALJ. Therefore, the
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1 ALJ was substantially justified in her original findings in the written decision on that
2 issue. In addition, reasonable minds could differ regarding other findings originally relied
3 on by the Court. Attorney's fees are provided pursuant to the Equal Access to Justice Act
4 only if the Administration's position was not substantially justified.

5 Therefore, as the Court has concluded that the Administration's positions were
6 substantially justified, plaintiff's motion for attorney's fees and costs (Dkt. 18) is denied.

7 BACKGROUND and PROCEDURAL HISTORY

8 On July 24, 2017, this Court issued an Order reversing and remanding this matter
9 for further consideration by the Administration (*see* Dkt. 16).

10 The Court found that the ALJ erred in reviewing the medical evidence when
11 failing to find that plaintiff's alleged fibromyalgia was a medically determinable
12 impairment (*see id.*). This matter was reversed pursuant to sentence four of 42 U.S.C. §
13 405(g) for further consideration due to the harmful error in the evaluation of plaintiff's
14 alleged fibromyalgia (*see id.*).

15 Subsequently, plaintiff filed a motion for EAJA attorney's fees, to which
16 defendant objected (*see* Dkt. 18). Defendant asserts that "the government's position was
17 substantially justified. Accordingly, the Commissioner asks the Court to deny Kerley's
18 motion for fees and costs." (Dkt. 19, p. 1, 5-6). Plaintiff did not file a reply (*see* Dkt.).

19 STANDARD OF REVIEW

20 In any action brought by or against the United States, the EAJA requires that "a
21 court shall award to a prevailing party other than the United States fees and other
22 expenses . . . unless the court finds that the position of the United States was
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1 substantially justified or that special circumstances make an award unjust." 28 U.S.C. §
2 2412(d)(1)(A).

3 According to the United States Supreme Court, "the fee applicant bears the burden
4 of establishing entitlement to an award and documenting the appropriate hours
5 expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government has the
6 burden of proving that its positions overall were substantially justified. *Hardisty v.*
7 *Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010), *cert. denied*, 179 L.Ed.2d 1215, 2011
8 U.S. LEXIS 3726 (U.S. 2011) (*citing Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir.
9 1995)). A finding that an Administrative finding is not based on substantial evidence is a
10 good indication of a lack of substantial justification. *See Meier v. Colvin*, 727 F.3d 867,
11 872 (9th Cir. 2013) (citations omitted). The Court has an independent duty to review the
12 submitted itemized log of hours to determine the reasonableness of hours requested in
13 each case. *See Hensley, supra*, 461 U.S. at 433, 436-37.

14 DISCUSSION

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16 In this matter, plaintiff clearly was the prevailing party because he received a
17 remand of the matter to the Administration for further consideration (*see* Order on
18 Complaint, Dkt. 16). In order to award a prevailing plaintiff attorney fees, the EAJA also
19 requires a finding that the position of the United States was not substantially justified. 28
20 U.S.C. § 2412(d)(1)(B).

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22 The Court notes that the fact that the Administration did not prevail on the merits
23 does not compel the conclusion that its position was not substantially justified. *See Kali v.*
24 *Bowen*, 854 F.2d 329, 334 (9th Cir. 1988)) (*citing Oregon Envtl. Council v. Kunzman*,

1 817 F.2d 484, 498 (9th Cir. 1987)). The Court also notes that when determining the issue
2 of substantial justification, the Court reviews only the “issues that led to remand” in
3 determining if an award of fees is appropriate. *See Toeblor v. Colvin*, 749 F.3d 830, 834
4 (9th Cir. 2014)). Hence, here, we have the issue of the ALJ’s failure to find that
5 plaintiff’s alleged fibromyalgia is a medically determinable impairment, determined to be
6 error based on new evidence subsequently added to the record by the Appeals Council.

7 The Supreme Court squarely addressed the meaning of the term “substantially
8 justified.” *See Pierce v. Underwood*, 487 U.S. 552, 564-68 (1988). The Court concluded
9 that “as between the two commonly used connotations of the word “substantially,” the
10 one most naturally conveyed by the phrase before us here is not “justified to a high
11 degree,” but rather “justified in substance or in the main” -- that is, justified to a degree
12 that could satisfy a reasonable person.” *Id.* at 565. The Court continued, noting that the
13 stated definition “is no different from the ‘reasonable basis both in law and fact’
14 formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals
15 that have addressed this issue.” *Id.* (citations omitted).

16 In addition, as stated by the Ninth Circuit, a “substantially justified position must
17 have a reasonable basis both in law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258
18 (9th Cir. 2001) (*citing Pierce v. Underwood, supra*, 487 U.S. at 565; *Flores v. Shalala*,
19 49 F.3d 562, 569 (9th Cir. 1995)). The Court is to focus on whether or not the
20 Administration was substantially justified in taking its original action; and, in defending
21 the validity of the action in court. *Id.* at 1259 (*citing Kali, supra*, 854 F.2d at 332).

1 First, the Court will address whether the Administration was substantially justified
2 in the original action, that is, the ALJ's written decision, when concluding that plaintiff's
3 alleged fibromyalgia was not a medically determinable impairment because the record
4 did not contain a diagnosis and because the physician had failed to perform an
5 examination and had not delineated any tender points. *See id.*; *see also* AR. 37.

6 Defendant argues that these findings by the ALJ were "accurate with the record
7 that was before the ALJ." Dkt. 19, p. 4. Plaintiff did not file a reply in support of her
8 motion for fees, and thus does not dispute this argument from defendant.
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10 The Court reversed this matter based on the conclusion that the "new evidence
11 demonstrates that the ALJ's findings regarding fibromyalgia are not supported by
12 substantial evidence in the record as a whole." Dkt. 16, p. 6. As the new evidence was not
13 before the ALJ, by definition, this suggests that defendant's argument is persuasive.

14 Although, as noted, plaintiff did not file a reply, plaintiff did briefly address
15 substantial justification in her motion for fees. *See* Dkt. 18, pp. 3-5. Plaintiff contends
16 that because the ALJ's decision was not supported by substantial evidence, that therefore
17 the government's position was not substantially justified as the Ninth Circuit considers
18 those standards to be substantially similar. *Id.* However, such argument fails to recognize
19 the fact that this Court concluded that the ALJ's finding was not based on substantial
20 evidence only when taking into account the new evidence that was not before the ALJ.
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22 Based on a review of the record as a whole, the Court concludes that defendant's
23 argument is persuasive and that the ALJ was substantially justified when, based on the
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1 original record, failing to find that plaintiff's fibromyalgia is a medically determinable
2 impairment.

3 The Court also must consider whether the Administration was substantially
4 justified in defending the validity of the action in court. *Gutierrez*, 274 F.3d at 1259
5 (*citing Kali, supra*, 854 F.2d at 332). Given that the Court has concluded that the
6 Administration was substantially justified in the original action, it naturally follows that
7 the Administration was substantially justified in defending the original action before this
8 Court. Plaintiff has offered no reason to find differently. Furthermore, defendant argues
9 that the new evidence "did not make remand a foregone conclusion." *See* Dkt. 19, p. 4.
10 The Court concludes for the further reasons stated below that defendant's position when
11 defending the ALJ's written decision on this issue was "justified to a degree that could
12 satisfy a reasonable person." *Pierce*, 487 U.S. at 565.

14 Defendant concedes that the ALJ's findings were contrary to the new evidence in
15 that the doctor *had* conducted an examination, witnessed sufficient tender points, and
16 diagnosed fibromyalgia. *See* Dkt. 19, p. 4; AR. 31. However, defendant contends that
17 although the ALJ may have altered the findings regarding fibromyalgia and functional
18 limitations if the new evidence had been part of the original record, (making the errors
19 not harmless), the record does not require that the ALJ do so due to the lack of explicit
20 ruling out of other diagnoses by acceptable means. *See id.* Plaintiff argued in the Opening
21 Brief that "Dr. Dilliard's diagnosis comports with the requirements of Social Security
22 Ruling (SSR) 12-2p, 2012 WL 3104869, pertaining to the evaluation of fibromyalgia,"
23 and acknowledged that such required "evidence that other disorders that could cause the
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1 symptoms or signs were excluded,” Dkt. 10, p. 5; *see also* p. 4 n.2. Plaintiff thereby
2 indicated to the Court that Dr. Dilliard had ruled out other diagnoses. *See id.*; *see also id.*
3 at p. 4 (“Dr. Dillard diagnosed Mr. Kerley with fibromyalgia on the basis of bilateral
4 tender points (14 of out 18), which he specifically identified, in addition to a history of
5 widespread pain, stiffness, myalgias, fatigue, diffuse tenderness, headaches, anxiety, and
6 sleep disturbance with no other pertinent findings to account for Mr. Kerley’s
7 symptoms”) (citing AR. 825-26, 832-35) (footnote omitted). However, plaintiff did not
8 direct the Court to any such rule out exclusionary diagnosis. Therefore, defendant’s
9 argument that remand was not a foregone conclusion based on the new evidence is
10 persuasive.
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12 The Court also reversed this matter with a finding that the ALJ erred when failing
13 the duty to develop the record; however, this finding, too, revolved around the same
14 treatment notes regarding the records and findings on fibromyalgia, which has just been
15 discussed. The record before the ALJ triggered the ALJ’s duty to develop the record as it
16 indicated that there was a previous treatment record establishing the fibromyalgia
17 diagnosis which was not at that time in the record. *See* AR. 640 (plaintiff presented “for a
18 *recheck* of fibromyalgia”) (emphasis added). However, the Court concludes that this is an
19 issue upon which reasonable minds could differ, given the inherent tension between the
20 ALJ’s duty to develop the record and plaintiff’s duty to provide all information required
21 to support a finding of disability. *Bowen v. Yuckert*, 482 U.S. 137, 146 (1987)) (*quoting*
22 42 U.S.C. § 423(d)(5)(A)). Therefore, the ALJ’s position is one about which reasonable
23 minds could differ, and the position is substantially justified.
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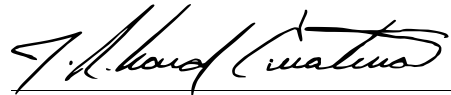
1 The Court also notes that plaintiff did not raise this issue regarding the duty to
2 develop record before the Court originally in his briefs. *See* Dkt. 10. Therefore, the Court
3 concludes that defendant was substantially justified in defending the ALJ's decision.

4 Defendant's position regarding the duty to develop the record is "justified to a
5 degree that could satisfy a reasonable person." *See Pierce*, 487 U.S. at 565.

6 CONCLUSION

7 Therefore, for the reasons stated and based on the record and briefs, the Court
8 concludes that plaintiff's motion for attorney's fees and costs (Dkt. 18) is denied. 28
9 U.S.C. § 2412(d)(1).
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11 Dated this 2nd day of February, 2018.

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13 J. Richard Creatura
14 United States Magistrate Judge
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